Page: **Jupt** 19, 2006

BAP Appeal No. 05-114

Docket No. 28

Filed: 07/11/2006

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE TRENTON J. BALDWIN, doing business as Cross-Triangle Brangus, doing business as Spot Light Flowers & Gifts, doing business as With Photography On The Side, and CAROLYN S. BALDWIN, also known as Carolyn S. Bailey, doing business as Broken Bow School of Dance, doing business as Spot Light Flowers & Gifts,

Debtors.

GERALD R. MILLER, Trustee,

Plaintiff – Appellee,

v.

BILL AND CAROLYN LIMITED PARTNERSHIP, an Oklahoma limited partnership, THE MAXIE O. "BILL" BAILEY LIVING TRUST, and MAXIE O. "BILL" BAILEY,

Defendant – Appellants,

and

TRENTON J. BALDWIN and CAROLYN S. BALDWIN,

Defendants.

BAP No. EO-05-114

Bankr. No. 04-72919 Adv. No. 04-7126 Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the Eastern District of Oklahoma

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^{*} This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Before CLARK, BROWN, and McNIFF, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

Appellants seek reversal of the bankruptcy court's order, after trial, finding that debtor Carolyn Baldwin's interest in a limited family partnership is property of her estate and ordering the limited partnership dissolved pursuant to Oklahoma law. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Debtors Trent and Carolyn Baldwin filed a petition for Chapter 7 bankruptcy relief in August, 2004. Carolyn is the sole limited partner in a limited partnership created by her parents in 1994, pursuant to the Oklahoma Uniform Limited Partnership Act, Okla. Stat. tit. 54, §§ 141-171 (2005). At the time of filing the petition, Carolyn owned a 99% interest in the partnership. The partnership's sole general partner is a trust, consisting of Carolyn's parents as the sole trustees. The partnership agreement grants exclusive management and control of the partnership and its assets to the general partner, which owns a 1% interest in the partnership. Further, the partnership agreement provides that "[t]he Limited Partner shall not take any part in or interfere in any manner with the conduct or control of the business of the Partnership or have any right or authority to act for or on behalf of the Partnership." The partnership will dissolve 50 years after execution of the partnership agreement, otherwise, dissolution only occurs if the general partner agrees to dissolution, dies, or becomes incompetent, insolvent, or bankrupt.²

Limited Partnership Agreement of Bill and Carolyn Limited Partnership ("Limited Partnership Agreement") ¶ 12.6, *in* Appellants' Appendix ("App.") Vol. II at 390.

Limited Partnership Agreement ¶ 15.1, in App. Vol. II at 393. It can only be assumed that the parties intended for dissolution to occur upon the death or mental incompetency of appellant Maxie O. "Bill" Bailey and his wife, co
(continued...)

The partnership assets consist of approximately 200 acres of undeveloped land that is partly timber and partly pasture, and a house that the partnership constructed on the land, in which debtors reside. The debtors maintain the house and pay the costs associated with it, including mortgage, taxes and utilities. Debtors also use the land, in part, for the grazing of cattle. The parties apparently agree that the total value of partnership assets is approximately \$400,000.

Following initiation of bankruptcy proceedings, the trustee filed an adversary proceeding against the partnership and the general partner seeking a declaration that Carolyn's interest in the partnership now belonged to the estate and, further, that continuation of the partnership was impracticable due to the general partner's refusal to recognize the estate's interest. After trial, the bankruptcy court ruled in favor of the trustee on both of these issues. The partnership and the general partner appeal.

APPELLATE JURISDICTION II.

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1. Neither party has elected to have this appeal heard by the United States District Court for the Eastern District of Oklahoma, and each have thereby consented to review of this case by the Bankruptcy Appellate Panel. 28 U.S.C. § 158(b) and (c); Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1.

III. **ISSUES ON APPEAL**

1) What interest in the partnership became property of the estate upon filing of the bankruptcy petition?

(...continued)

trustees of the general partner, since the general partner, a trust, can neither die nor be declared mentally incompetent.

2) Was the partnership properly dissolved pursuant to Oklahoma law?

IV. DISCUSSION

A. Trustee's Partnership Interest

Appellants contend that the trustee's claim to the partnership is in the nature of a judgment creditor, who must obtain a charging order pursuant to Okla. Stat. tit. 54, § 342 (2005),³ and who would be treated as an assignee of Carolyn's interest in the partnership. As such, any recovery would be limited to Carolyn's interest in partnership profits and accrued distributions, of which there are none. However, although state law determines the nature of Carolyn's partnership interest, federal law determines the extent to which that partnership interest becomes a part of the estate. *Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d 1190, 1197 (10th Cir. 2002).

At least two factually similar cases have held that a debtor's rights pursuant to a family partnership or limited liability company become property of the bankruptcy estate and may be exercised by the trustee. In Samson v. Prokopf (In re Smith), 185 B.R. 285 (Bankr. S.D. Ill. 1995), the court held that a limited partner "has contractual rights arising from the partnership" that are "legal or equitable interests of the debtor within the ambit of 11 U.S.C. § 541(a)(1)⁴ and become property of the bankruptcy estate." Id. at 290-91 (footnote omitted). Thus, "the right to obtain judicial dissolution vested in the debtor's estate upon her bankruptcy filing, and the trustee, as representative of her estate, succeeded to

Applicability of this provision, which specifically applies only to judgment creditors, initially requires acceptance of appellants' unsupported assumption that a trustee in bankruptcy becomes a judgment creditor with respect to a debtor's property interests, rather than one standing in the shoes of the debtor.

This bankruptcy proceeding was filed prior to the October 17, 2005, enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which is expressly non-retroactive. Therefore, all references herein to Title 11 of the United States Code are as it was prior to enactment of BAPCPA.

the debtor's right to bring this cause of action by operation of law." *Id.* at 292 (citations omitted).

Similarly, in *Movitz v. Fiesta Invs.* (*In re Ehmann*), 319 B.R. 200, 204 (Bankr. D. Ariz. 2005), the court considered the estate's interest in a limited liability company that was set up by the debtor's parents in order "to remove assets from the parents' estates for estate tax purposes, and to accumulate investments for the benefit of their children after their deaths." The court concluded that the "[t]rustee has all of the rights and powers with respect to [the company] that the [d]ebtor held as of the commencement of the case[,]" including the right to seek dissolution. *Id.* at 206.⁵

We conclude that the bankruptcy court was correct in finding that Carolyn's partnership interests became property of her estate at the time of filing the petition. Likewise, the bankruptcy court correctly determined that the trustee in bankruptcy steps into the shoes of the debtor with respect to partnership interests and may assert whatever rights the debtor has as a partner under the partnership agreement and state law, including the right to seek dissolution. We therefore affirm these conclusions.

B. Dissolution

The next issue is whether the bankruptcy court correctly determined Carolyn's rights as a limited partner under the partnership agreement and under Oklahoma law. Appellants correctly point out that Carolyn's rights under the partnership agreement are extremely limited. In fact, the partnership agreement

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Both *Smith* and *Ehmann* discussed whether limited partnership agreements were "executory contracts" governed by 11 U.S.C. § 365, and concluded that unless the debtor owed such a material obligation to the partnership that failure to perform it would relieve the partnership of its obligations to debtor, the debtor's limited partnership interest was a "property interest" governed by § 541, rather than by § 365. To the extent that appellants contend that the Limited Partnership Agreement constitutes an executory contract, we reject that contention, and find that § 541 controls.

grants Carolyn no right to manage the partnership, to sell or demand distribution of partnership property, or to dissolve the partnership.⁶ The partnership agreement provides limited circumstances under which the partnership may be dissolved, none of which are applicable to the present situation.⁷ Therefore, dissolution pursuant to the partnership agreement would be improper.

However, in ordering dissolution of the partnership, the bankruptcy court relied on Oklahoma law, rather than on the partnership agreement. Oklahoma specifically allows limited partners to seek dissolution of a partnership "whenever it is not reasonably practicable to carry on the business [of the partnership] in conformity with the partnership agreement." Okla. Stat. tit. 54, § 346 (2005). As previously noted, the bankruptcy court correctly held that the trustee had whatever rights Carolyn had to seek dissolution of the partnership under this provision. Whether the partnership was properly dissolved pursuant to this statute is a mixed question of fact and law. We review the bankruptcy court's findings regarding the fundamental facts of the partnership's business under a clearly erroneous standard and its application of the statute to those facts *de novo*. *Sender v. The Bronze Group, Ltd. (In re Hedged-Invs. Assocs., Inc.)*, 380 F.3d 1292, 1297-98 (10th Cir. 2004). A factual finding is "clearly erroneous" when "it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has

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We note, however, that Carolyn apparently does have a right to "withdraw" from the partnership pursuant to ¶ 16 of the Limited Partnership Agreement, which right the trustee does not here attempt to exercise, and instead seeks only to dissolve the partnership and liquidate its assets. Limited Partnership Agreement at \P 16, in App. Vol. II at 395.

See Limited Partnership Agreement ¶ 15.1, in App. Vol. II at 395.

Virtually identical statutory language was considered in the *Smith* case. However, because that matter was before the court on a motion for summary judgment, issues of fact precluded a finding that carrying on the partnership business was not practicable. 185 B.R. at 294-95.

been made." Las Vegas Ice & Cold Storage Co. v. Far W. Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) (citation omitted).

From the evidence at trial, the bankruptcy court found that the general partner "does not recognize the [trustee's] interest in the Partnership as trustee of the bankruptcy estate. Furthermore, the Partnership no longer serves any estate planning purpose. [The general partner] even stated at trial that he considered the future development of the property into residential lots as a possibility." From these findings, the bankruptcy court determined that it was no longer "reasonably practicable" to carry on the partnership's business.⁹

The partnership agreement defines its business purpose as follows:

The purpose of this Partnership shall be to engage in general business activities including but not limited to the purchasing, holding, construction, owning, operation, improving, managing, mortgaging, leasing and selling of and dealing in and with real property. In addition to the foregoing, the Partnership may engage in any business activity in which any limited partnership may engage under the laws of the State of Oklahoma.¹⁰

At trial, Mr. Bailey, Carolyn's father, testified that the partnership was set up in 1994 as a part of his effort to remove assets from his estate for tax purposes. ¹¹ Mr. Bailey characterized the primary and continuing purpose of the partnership as estate planning, with the intent that he would retain full management and control of the partnership assets during his lifetime. ¹² He further testified that the partnership had at one time invested in mutual funds for a small profit, ¹³ that

November 15, 2005, Order ("Order") at 6, in App. Vol. I at 270.

Limited Partnership Agreement at ¶ 4, in App. Vol. II at 381.

October 6, 2005, Trial Transcript ("Tr.") at 47-50, in App. Vol. I at 321-24.

¹² *Id.* at 66-67, *in* App. Vol. I at 340-41.

¹³ *Id.* at 59-60, *in* App. Vol. I at 332-33.

lumber from the property had been sold at a profit to his lumber company,14 and that he expected the property to appreciate in value, at which point, the partnership might sell lots out of the 200 acres and/or develop a subdivision for profit. 15 All of the partnership profits were put back into the partnership property.¹⁶ Mr. Bailey also testified that it was his opinion that the trustee should not get the partnership property, and that Carolyn should be his partner.¹⁷ Finally, Mr. Bailey testified that the partnership was an ongoing part of his estate planning.¹⁸

After reviewing the record, this court is left with the definite and firm conviction that the bankruptcy court was mistaken in finding that the partnership no longer serves an estate planning purpose. As was the limited liability company in Ehmann, the limited partnership was set up to allow Mr. Bailey to retain complete control of the partnership assets during his lifetime, while at the same time removing them from his estate for tax purposes. This purpose is still being served and will continue to be served even if the partnership were to become totally inactive. In addition, at various times the general partner has made, or attempted to make, profits for the partnership that were then reinvested in the property. Such profit-seeking efforts, such as the possible sale or subdivision of the real property, are expected to continue as circumstances allow, and serve the partnership purpose of preserving and maintaining assets for the benefit of Mr.

¹⁴ *Id.* at 63-64, in App. Vol. I at 336-37.

¹⁵ *Id.* at 68, in App. Vol. I at 342.

¹⁶ *Id.* at 60-61, in App. Vol. I at 334-35.

¹⁷ *Id.* at 72-73, in App. Vol. I at 346-47.

¹⁸ Id.

Bailey's heirs.¹⁹ Given that the partnership was set up, among other things, to hold, improve, and sell real property, along with any other valid business purpose, we can only conclude that the partnership is still operated within the parameters of its stated purposes.

In addition, Okla. Stat. tit. 54, § 346 (2005), the statute upon which the bankruptcy court relied in dissolving the partnership, requires a finding that it is no longer "reasonably practicable to carry on the business [of the partnership] in conformity with the partnership agreement." The bankruptcy court found this provision applicable because the general partner "does not recognize" the trustee's interest in the partnership.²⁰ However, the precise purpose of the adversary proceeding and this appeal is to let Mr. Bailey know just what interest the trustee holds. Mr. Bailey testified that he did not believe that the trustee should be given Carolyn's partnership interest, and that he did not want the trustee to be his partner.²¹ Significantly, however, Mr. Bailey did not testify that he could or would not continue to carry out his duties as general partner in the event the trustee was found to have an interest in the partnership, nor did he testify that he would refuse to recognize the court's determination of the trustee's interest. In any event, the partnership agreement does not require Mr. Bailey either to deal with or to "recognize" the limited partner as he carries out his duties as general partner.

Since the trustee holds Carolyn's rights with respect to the partnership, and since Carolyn has neither management power under the partnership agreement, nor any present right to dissolve or liquidate the partnership, then the trustee

In fact, absent its for profit" business purposes, the limited partnership might not be a lawful partnership under Oklahoma law. *See* Okla. Stat. tit. 54, § 1-101(6) and § 144 (2005); *Roby v. Day*, 635 P.2d 611, 613 (Okla. 1981).

Order at 6, in App. Vol. I at 270.

²¹ Tr. at 72-73, in App. Vol. I at 72-73.

doesn't either. Carolyn, and therefore the trustee, does have a right under state law to require the general partner to exercise his partnership duties as a fiduciary. Okla. Stat. tit. 54, § 1-404 (2005). In addition, the trustee has succeeded to any rights Carolyn could exercise under the Limited Partnership Agreement, including without limitation, the rights set forth in ¶¶ 14 and 16 of that agreement. However, since the partnership is operating as allowed under the partnership agreement and Oklahoma law, we are constrained to say that the trustee has no present right to force either dissolution of the partnership or liquidation of its assets.

V. CONCLUSION

We therefore reverse the bankruptcy court's conclusion that the partnership is subject to dissolution pursuant to Okla. Stat. tit. 54, § 346 (2005), and remand for further proceedings in accordance with this decision.